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COMMENT

Estate Liability Under Civil RICO:¹ Recognizing the Duality of a Treble Damage Award

I. Introduction

Generally, actions for penalties² do not survive the death of the alleged wrongdoer.³ Actions for penalties are designed to punish the wrongdoer and to deter future misconduct. In this respect, they are analogous to actions for punitive damages.⁴ The purposes behind imposition of penalties cannot be served if the wrongdoer is dead. That wrongdoer is beyond punishment; it is not necessary to deter future misconduct.⁵

Whether a civil RICO action is an action for a penalty and does not survive the death of the alleged RICO violator is a controversial issue increasingly faced by courts. A civil RICO action is primarily an action for treble damages.⁶ Thus, in determining whether a civil RICO action survives, both courts and commentators have focused on the characteri-

1. Racketeer Influenced and Corrupt Organization Act, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1982)). Congress enacted RICO on October 15, 1970, as title IX of the Organized Crime Control Act of 1970. This comment focuses on the civil treble damages provision, codified at 18 U.S.C. § 1964(c) (1982).

2. See BLACK'S LAW DICTIONARY 1266 (5th ed. 1979) (defining statutory penalty as "[a sum of money] which an individual is allowed to recover against a wrongdoer as satisfaction for wrong or injury suffered, without reference to actual damage sustained").

3. See *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884).

4. Goering, *The Characterization of Treble Damages: Conflict Between a Hybrid Mode of Recovery and Jurisprudence of Labels*, in *TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: MATERIALS ON RICO* 428, 434 n.6b (G. Blakey ed. 1980).

For purposes of this comment, analogies drawn between penalties and punitive damages focus on the like purposes served by these damage awards, namely punishment and deterrence. For a detailed discussion of the origins and unique characteristics of the word penalty, see *id.* at 458-72.

5. *Savarese v. Agriss*, 883 F.2d 1194, 1205 (3d Cir. 1989) (punitive damages are not generally awarded against a decedent); *In re GAC Corp.*, 681 F.2d 1295, 1301 (11th Cir. 1982) (purpose of punitive damages is not met when paid from the wrongdoer's estate); *Barnes v. Smith*, 305 F.2d 226, 231 (10th Cir. 1962) (estate cannot be held liable for punitive damages); *Amos v. Prom*, 115 F. Supp. 127, 134 (N.D. Iowa 1953) (no exemplary damages may be awarded against an estate; such damages are a punishment extracted only from the wrongdoer).

6. *Tellis v. United States Fidelity & Guar. Co.*, 805 F.2d 741, 745 (7th Cir. 1986), *vacated and remanded on other grounds*, 483 U.S. 1015 (1987) (treble damage provision is most significant aspect of a civil RICO action); *Overland Bond & Inv. Corp. v. Rocky*, 646 F. Supp. 194, 195 (N.D. Ill. 1986) (civil RICO claim is best characterized as a treble damage action); *Electronic Relays (India) PVT. Ltd. v. Pascente*, 610 F. Supp. 648, 651 (N.D. Ill. 1985) (the intent of Congress in adding the civil provisions to RICO was to allow a suit for treble damages).

zation of RICO treble damages. Some argue that RICO treble damages are penal in nature, meant to inflict punishment upon the wrongdoer, and therefore are not recoverable from the estate of the alleged RICO violator.⁷ Others argue that RICO treble damages are remedial in nature, serving primarily as compensation to the victim and therefore, are recoverable from the alleged RICO violator's estate.⁸

The approach taken by courts and commentators confronted with this issue is to categorize RICO treble damages as either exclusively penal or exclusively remedial. However, congressional intent that RICO treble damages effectuate a dual purpose compels the conclusion that these damages should not be subject to exclusive characterization.⁹ RICO treble damages are meant to serve a deterrent, penal function, as well as a compensatory, remedial function. In fact, RICO treble damages have been aptly described as a type of hybrid damages.¹⁰ Therefore, it is disingenuous to attempt exclusive categorization of the RICO treble damage provision.

This comment proposes a plain solution which avoids the problems associated with exclusive characterization of RICO treble damages. In deciding whether to allow a claim for RICO treble damages to be brought against an estate, courts should ascertain whether both the penal and remedial purposes of the treble damage award will be given effect. Simply put, only when both purposes of RICO's treble damage provision are served should the action proceed. When either purpose is not served by the lawsuit, the action should be dismissed.

This comment argues that courts must consider both purposes when interpreting the RICO treble damage provision. First, the comment searches for Congress' intent in enacting the civil RICO treble damage provision to illuminate why courts struggle with its interpretation. Second, the comment evaluates various interpretative methods employed by the courts and illustrates how these methods fail to support an exclusive characterization of RICO treble damages. Third, an examination of case law applying these interpretative methods reveals that to the extent courts have ignored the dual nature of RICO treble damages, courts have erroneously applied these interpretative methods and have achieved wildly inconsistent results.

Finally, an examination of pending legislation directed to reforming the current civil RICO statute emphasizes that treble damages under RICO do in fact serve dual purposes. This comment concludes that in the context

7. *Summers v. Federal Deposit Ins. Corp.*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984) (RICO treble damages are essentially penal).

8. *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 682 (N.D. Ind. 1982) (RICO treble damages are remedial and survive death of alleged wrongdoer), *overruled on statute of limitations grounds sub nom. Ashland Oil, Inc. v. Arnett*, 656 F. Supp. 950, 953 (N.D. Ind. 1987); Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 535 n.47 (1986) [hereinafter Note, *Characterization & Computation*] (RICO's treble damages are remedial).

9. See *infra* notes 71-72 and accompanying text.

10. Note, *Characterization & Computation*, *supra* note 8, at 527 (RICO treble damages are a hybrid form of damages).

of estate liability, the penal purposes inherent in a RICO treble damage award can never be effectuated. The wrongdoer is dead and beyond punishment. Because both purposes of RICO treble damages are not met, the action for treble damages against the estate of the RICO violator must fail.

II. Recovery of Punitive Damages Against Estates of Dead Tortfeasors

A majority of states reject imposition of punitive damages against the estate of the alleged wrongdoer.¹¹ These courts view punitive damages as a monetary penalty imposed on the defendant to punish him and to discourage others from similar behavior.¹² This rule comports with fairness and serves the interests of justice. If recovery of punitive damages were allowed against an estate, as the Florida Supreme Court¹³ observed, the natural extension of this rule would require a decedent's widow and children to pay a fine or be imprisoned for the decedent's criminal conduct. Once the wrongdoer is dead, there is no one to punish.¹⁴ To punish innocent heirs would contravene our basic philosophy of justice.¹⁵

Of course, a small measure of deterrence might be obtained by punishing the wrongdoer's estate. With regard to specific deterrence, the tortfeasor may want to avoid subjecting his innocent heirs to punishment for his illegal acts. In reality, however, this type of punishment is likely to be so far removed from the tortfeasor's state of mind at the time the tort is committed that any deterrence would at best be minimal. It is extremely unlikely that a would-be tortfeasor contemplates the possibility that his conduct may reduce the size of his estate.¹⁶

With regard to general deterrence, actual punishment is a necessary prerequisite. Advocates of the majority rule, rejecting imposition of punitive damages against an estate, assert that general deterrence is effectuated only when society witnesses the wrongdoer himself being punished.¹⁷

11. Comment, *Punishing the Dead: Whether the Estates of Dead Tortfeasors Should Be Responsible for Punitive Damages*, 12 U. ARK. LITTLE ROCK L.J. 283, 284-85 (1990).

A minority of states view punitive damages as serving a compensatory purpose in addition to punishment and deterrence. This minority allows recovery of punitive damages against the dead tortfeasor's estate. Punitive damages are thought, by this minority, to compensate for traditionally noncompensable damages such as attorneys' fees. *Id.* at 286 & n.15. The problem with this view, and the reason why it is accepted only by a minority of courts, is that the focus of punitive damages is on the wrongdoer, not the tort victim and thus, compensation is not a legitimate concern of punitive damages.

12. *Id.* at 297-99.

13. *Lohr v. Byrd*, 522 So. 2d 845 (Fla. 1988).

14. The ineffectiveness of punishment against the innocent heirs of the wrongdoer's estate has been used as an analogy in other contexts where the true wrongdoer is beyond punishment. See *Professional Asset Management Inc. v. Penn Square Bank, N.A.*, 566 F. Supp. 134, 137 (W.D. Okla. 1983) (analogy drawn between ineffectiveness of punishment against innocent creditors of bank and innocent heirs of estate).

15. *Lohr*, 522 So. 2d at 847.

16. Comment, *supra* note 11, at 299.

17. *Id.* at 298-99.

Therefore, deterrence is not effective when the wrongdoer can no longer be punished, as in the case of the dead tortfeasor.¹⁸ In addition, even where minimal deterrence may be effectuated, society opposes punishing the innocent.¹⁹

The analogy to punitive damages is not faultless. Unlike traditional tort actions in which punitive damages are recoverable in addition to compensatory damages, in the RICO context refusing to allow recovery of treble damages from the wrongdoer's estate defeats the plaintiff's entire recovery under the RICO statute. The trebling of RICO damages is mandatory.²⁰ Therefore, courts must make an all or nothing award and are left with no discretion to award only actual damages.²¹

III. Civil RICO's Dual Purposes

A. Origins

Congress first introduced RICO as a means to fight organized crime and prevent its infiltration into legitimate businesses.²² To that end, Congress allowed for a private right of action to be brought under section 1964(c).²³ Section 1964(c) provides: "Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and *shall* recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."²⁴

Section 1962(b) is violated by "any person²⁵ employed by or associated with any enterprise engaged in, or the activities of which affect, interstate

18. *Id.*

19. *Id.* at 295 nn.63, 64.

20. See *infra* text accompanying note 24.

21. Cf. *Sinclair Oil Corp. v. Atlantic Richfield Co.*, 720 F. Supp. 894, 902 n.17 (D. Utah 1989) (Congress did not split the treble damage provision of § 210 of the Economic Stabilization Act into two distinct actions, one for compensation and one for punishment, and there is no legal principle which allows the judiciary to do so).

In the RICO context, at least one court, ignoring the mandate that damages be trebled, awarded only actual damages and ruled that any recovery under the treble damage provision in excess of actual damages is penal. See *infra* text accompanying notes 165-69.

22. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose).

23. 18 U.S.C. § 1964(c) (1982). Congress' declared purpose in adopting the civil RICO provision was "[t]o seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process and by establishing new penal prohibitions and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose).

24. 18 U.S.C. § 1964(c) (1982) (emphasis added).

25. An estate can be sued under RICO. RICO defines a "person" as any individual or entity capable of holding a legal or beneficial interest in property. 18 U.S.C. § 1961(3) (1982). Courts have held that because an estate is capable of holding a legal interest in property, the estate of an alleged wrongdoer is within the plain meaning of section 1961(3). See, e.g., *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D.

or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."²⁶ A pattern of racketeering activity, defined by section 1961(5), requires at least two acts of racketeering activity.²⁷ Racketeering activity, defined by section 1961(1), embraces a wide variety of indictable criminal acts.²⁸

Congress failed to enumerate the purposes to be served by a civil RICO action and, more specifically, the purposes to be achieved by a treble damage award. As one court noted, "With almost no legislative debate or comment, [RICO] was extended as an afterthought to civil cases to encourage private suits as a supplement to the efforts of federal law enforcement agencies."²⁹ As a result, an explosion of case law and commentary has emerged which wrestles with the problems created by Congress' failure to clarify the purposes of the civil RICO treble damage provision.³⁰

Interpreting the amorphous language of the RICO treble damage provision has been an insurmountable source of hostility and frustration among courts. In many instances, courts have declined to search for congressional intent and instead have construed RICO both literally and broadly.³¹ In addition, the judiciary, understandably critical of the lack

Ind. 1982), *overruled on statute of limitations grounds sub nom.* Ashland Oil, Inc. v. Arnett, 656 F. Supp. 950, 953 (N.D. Ind. 1987).

26. 18 U.S.C. § 1962(c) (1982).

27. *Id.* § 1961(5).

28. *Id.* § 1961(1).

29. County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1394 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); *see also* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987); Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 486-88 (1985); P.M.F. Servs. v. Grady, 681 F. Supp. 549, 555 (N.D. Ill. 1988); Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 677-78 (1990). *But see* Goldsmith & Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 741 (1990) (civil RICO was not a mere afterthought to criminal RICO, rather Congress gave ample consideration to its formation).

30. The list of commentators addressing civil RICO issues is extensive. *See, e.g.*, Campbell, *Civil RICO Actions in Commercial Litigation: Racketeer or Businessman?*, 36 Sw. L.J. 925 (1982); Case Comment, *Civil RICO: Liberally Construed to Effectuate Its Remedial Purpose*, 37 U. FLA. L. REV. 1075 (1985); Hellerstein & Mullins, *The Likely Insurance Treatment of Treble Damage RICO Judgments*, 42 BUS. LAW. 121 (1986); Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201 (1981); Patton, *Civil RICO: Statutory and Implied Elements of the Treble Damage Remedy*, 14 TEX. TECH L. REV. 377 (1983); Note, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 LA. L. REV. 1411 (1988); Note, *Characterization & Computation*, *supra* note 8, at 526.

31. *See* Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 707-08; H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 246 (1989); Furman v. Cirrito, 828 F.2d 898, 903 (2d Cir. 1987); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985).

of legislative history, has called upon Congress to amend the statute. Courts complain that RICO is too broadly drafted and, in many instances, provides a windfall for plaintiffs.

Nonetheless, bound by the language of the statute, courts are compelled to uphold RICO awards. As one court declared, even if it is unlikely that Congress intended RICO to apply to such a vast gamut of factual circumstances, courts are required to "follow where the words of the statute lead . . . [F]ederal power inches forward when a statute is left unattended, whether from Congress' indifference or its acquiescence."³² Thus, notwithstanding the confusion surrounding the civil RICO treble damage provision, courts are bound by its ambiguity until Congress acts to amend the statute.

B. Interpretation

In interpreting the RICO treble damage provision, courts rely upon two primary sources of congressional intent. First, section 904(a) of title IX provides: "The provisions of this title shall be liberally construed to effectuate its remedial purpose."³³ Second, courts derive guidance from the analogous civil provisions of the Clayton Act, an antitrust statute.³⁴ Additionally, courts invoke traditional distinctions drawn between penal statutes and remedial statutes.³⁵

1. Liberal Construction and Remedial Purposes

For some courts, the sole rationale for concluding that RICO treble damages are remedial is provided in the language of title IX which mandates that RICO be "construed liberally to effectuate its remedial purpose."³⁶ Other courts have concluded that this language does not establish the remedial character of RICO treble damages.³⁷ Unfortunately, sole reliance on this language leads courts to conclude automatically that RICO treble damages have but one purpose, to compensate the victim. This

32. *Schreiber Distrib. Co. v. Serv-well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring). Addressing this problem, the Supreme Court has commented: "It is true that private civil actions under the statute are being brought almost solely against defendants, rather than against the archetypal, intimidating mobster. Yet this defect — if defect it is — is inherent in the statute as written, and its correction must lie with Congress." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1984).

33. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947.

34. 15 U.S.C. § 15 (1982). For the language of this provision, see *infra* text accompanying note 42.

35. This distinction was first recognized by the Supreme Court in *Huntington v. Atrill*, 146 U.S. 657, 666-69 (1892).

36. See, e.g., *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D. Ind. 1982) (interpreting congressional purpose of RICO as explicitly remedial), *overruled on statute of limitations grounds sub nom. Ashland Oil, Inc. v. Arnett*, 656 F. Supp. 950, 953 (N.D. Ind. 1987).

37. See, e.g., *Summers v. Federal Deposit Ins. Corp.*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984) (Congress provided for RICO as a whole to be liberally construed in order to effectuate its remedial purposes, but this does not mean that the statute is solely remedial).

rationale fails to give due credit to the penal function that treble damages effectuate. As aptly noted by one commentator, viewing RICO's treble damage provision as primarily compensatory fails to acknowledge that this provision was enacted to further the war on crime.³⁸ Congress intended treble damages to do more than just punish businesses operating in violation of RICO; Congress intended treble damages to actually destroy those businesses.³⁹

This comment emphasizes that, notwithstanding the strong tendency among courts to conclude that the sole purpose of the RICO statute is remedial, RICO treble damages do have a penal purpose. Other courts insist that the remedial purpose of RICO treble damages predominates and therefore the statute's penal purposes should be ignored. These practices are unfounded. True, Congress did not state that RICO treble damages are 50% remedial and 50% penal. But neither did Congress state that RICO treble damages are 90% remedial and 10% penal. What Congress has stated is that RICO treble damages serve both to redress wrongs to the individual and to deter future wrongs to the public.⁴⁰ Thus, Congress' desire that RICO treble damages serve two purposes is clear. It remains, however, for courts to apply the statute consistently, giving effect to both purposes.

2. *Antitrust Precedent*

The legislative history of section 1964(c) reveals that Congress relied heavily on the Clayton Act in enacting the civil RICO provision.⁴¹ In fact, Congress lifted virtually word for word from the Clayton Act the following language:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.⁴²

Consequently, courts called upon to characterize RICO treble damages have relied extensively on interpretations of the Clayton Act's civil remedy provision.⁴³

38. Turley, *The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO*, 33 VILL. L. REV. 239, 250 n.56 (1988).

39. *Id.* at 251.

40. See *supra* note 23.

41. 116 CONG. REC. 27,739 (1970) (Rep. Steiger's letter to House Judiciary Committee) (RICO civil enforcement remedy is a "parallel private . . . remed[y]" to the Clayton Act); *Organized Crime Control: Hearings on S.30 Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 543-44 (1970) [hereinafter *Organized Crime Control*] (testimony of ABA president Edward L. Wright discussing borrowing of Clayton Act language for private damage provision of RICO).

42. 15 U.S.C. § 15 (1982).

43. However, Congress intentionally cast RICO as a separate statute and therefore, while

Reliance on antitrust precedent has its pitfalls. Even though Congress borrowed the language of the RICO treble damage provision from the Clayton Act, the two statutes serve fundamentally different purposes. The Clayton Act protects competition in the marketplace. Its thrust is to ensure market efficiency rather than to protect individual businesses from harm. RICO, conversely, aims to financially ruin those who engage in criminal enterprise.⁴⁴

Nonetheless, the Supreme Court has embraced antitrust precedent in determining the nature of RICO treble damages.⁴⁵ Thus, it is beneficial to review how the Supreme Court has interpreted the Clayton Act treble damage provision and how the Court has analogized interpretation of the Clayton Act treble damage provision to the RICO treble damage provision.

In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,⁴⁶ the central issue before the Court was whether a corporation could be held civilly liable under the antitrust laws for acts of its agents performed with apparent authority. Hydrolevel, the respondent, marketed a safety valve device. An agent of the American Society of Mechanical Engineers (ASME) issued an unofficial opinion that Hydrolevel's product was unsafe. Subsequently, Hydrolevel sued ASME, alleging that ASME's declaration that the product was unsafe resulted in market resistance to the product and was therefore a violation of the Sherman Act.

The Court rejected ASME's argument that treble damages for antitrust violations are punitive and therefore, under traditional agency law, should not be imposed upon the principal for the acts of its agent.⁴⁷ The Court conceded that antitrust treble damages serve in part to punish violations of the antitrust laws.⁴⁸ However, the Court held that the antitrust private action is primarily remedial, serving to compensate victims of antitrust violations.⁴⁹

The Court declined to characterize antitrust treble damages as purely penal or purely remedial. Rather, the Court recognized the hybrid nature

antitrust precedent may provide some guidelines, it is not controlling. After noting that RICO drew heavily from antitrust remedies, Senator McClellan stated that there was "no intention . . . of importing the great complexity of antitrust law enforcement into this field." 115 CONG. REC. 9567 (1969). See also *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 512 (1985) (Marshall, J., dissenting) (Congress did not add to the existing antitrust laws but instead created a distinct and separate RICO statute).

44. *Furman v. Cirrito*, 741 F.2d 524, 532 (2d Cir. 1984) (citations omitted), *vacated and remanded on other grounds sub nom. Joel v. Cirrito*, 473 U.S. 922 (1985); see also Turley, *supra* note 38, at 250 (the goal of the Clayton Act is cost minimization in dispensing damages while the goal of RICO strives for penalty maximization).

45. In *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 152 (1987) the Court stated that the clear legislative intent behind RICO is to pattern its civil enforcement provision (i.e., its provision for treble damages) on the civil enforcement provision of the Clayton Act.

46. 456 U.S. 556, *reh'g denied*, 458 U.S. 1116 (1982).

47. *Id.* at 575.

48. *Id.*

49. *Id.*

of antitrust treble damages and simply stated that private antitrust actions are primarily, but not solely, remedial.⁵⁰

Other decisions by the Court show a reluctance to exclusively characterize antitrust treble damages and also illuminate the Court's contradictory resolutions of the issue. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*,⁵¹ the Court indicated that treble damages under section four of the Clayton Act are punitive by stating that the concept of treble damages contemplates punishment and deterrence of unlawful conduct, not enhancement of a wrongdoer's liability.⁵²

Nevertheless, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,⁵³ the Court recognized the hybrid nature of antitrust treble damages, but concluded that the treble damage provision was designed primarily as a remedy.⁵⁴ Not surprisingly, the Court's reluctance to exclusively characterize antitrust treble damages has spawned divergent decisions in the lower courts.⁵⁵

In applying antitrust precedent to RICO claims for treble damages, the Supreme Court reached similar conclusions. In *Agency Holding Corp. v. Malley-Duff & Associates*,⁵⁶ the Court explored the similarities of RICO and the Clayton Act in an attempt to determine whether a uniform statute of limitations applies in civil RICO actions. In *Malley-Duff*, an insurance company ended its relationship with its agent, allegedly due to the agent's failure to meet a production quota. The agent sued the insurance company under civil RICO, claiming that the termination of the relationship was in violation of the statute. The insurance company challenged the agent's RICO claim on a statute of limitations ground, alleging that the claim was not timely.

According to the Court, both RICO and the Clayton Act provide for recovery of treble damages in order to remedy economic injury.⁵⁷ In addition, both statutes encourage individuals to act as private attorneys

50. *Id.*

51. 451 U.S. 630 (1981).

52. *Id.* at 639.

53. 429 U.S. 477 (1977).

54. *Id.* at 486-87.

55. *Compare* Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 440 (S.D.N.Y. 1978), *aff'd in part and rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (section 4 of the Clayton Act is not "penal"; trebling of damages is compensatory in a "special sense" that it insures wrongs do not go unredressed because of difficulty of proving damages) *and* *Nomand v. Twentieth Century Fox Film Corp.*, 37 F. Supp. 649, 657 (W.D. Okla. 1941) ("right of action created by Section 7 of the Sherman Antitrust Act, is not penal but remedial . . .") *with* *Kline v. Caldwell, Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (treble damages are of a statutory punitive nature); *Vandervelde v. Put & Call Brokers & Dealers Ass'n*, 344 F. Supp. 118, 156-57 (S.D.N.Y. 1972) (single damages, not treble damages are recoverable from estates found liable under § 4 of the Clayton Act) *and* *Rogers v. Douglas Tobacco Bd. of Trade*, 244 F.2d 471, 483 (5th Cir. 1957), *cert. denied*, 361 U.S. 833 (1959) (trebling of damages under antitrust law does not survive; such damages constitute a penalty).

56. 483 U.S. 143 (1987).

57. *Id.* at 151.

general. The prospect of recovering treble damages furnishes private individuals with a strong incentive to prosecute criminals, thus enhancing public prosecutorial resources, which are inadequate to deal with all facets of organized crime.⁵⁸

After setting the stage for application of Clayton Act principles to RICO, the Court concluded that the appropriate statute of limitations for civil RICO is the four-year period applied in antitrust cases.⁵⁹ The similarity of federal policies underlying both RICO and the Clayton Act justifies the selection of the four-year statute of limitations for Clayton Act actions as the most appropriate limitations period for RICO actions.⁶⁰ More generally, the similarities between RICO and the Clayton Act justify the Court's reliance on antitrust precedent in the RICO context.

In *Shearson/American Express, Inc. v. McMahon*,⁶¹ the Court again compared RICO to the Clayton Act. This time, the Court examined whether a RICO claim is arbitratable pursuant to an arbitration agreement between a broker and its customers. The customers argued that the public interest in the enforcement of RICO precluded submitting the RICO claim to arbitration.

The Court emphasized that in the antitrust context, the compensatory function of treble damages predominates over the deterrent function.⁶² In the Court's view, the legislative history of the RICO treble damage provision reveals the same emphasis on the remedial role of the treble damage provision as does the Clayton Act treble damage provision.⁶³ Furthermore, the penal aspect of civil RICO, although important, is secondary.⁶⁴

Although the Supreme Court has continuously emphasized the primacy of RICO's treble damage provision, it has also refused to exclude categorically the possibility that treble damages also serve as a penalty. Thus, RICO litigants are not precluded from arguing that treble damages in fact serve a penal function.

3. *Penal v. Remedial Statutes: The Murphy Test*

A third interpretative mechanism courts have employed to characterize RICO treble damages is a test designed to determine whether a statute imposes a penalty or provides a remedy. This test encompasses aspects of both means of interpretation discussed above.

Statutes imposing a penalty and statutes providing a remedy are distinguished by employing a test first introduced by the Supreme Court in

58. *Id.* See also *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985) (legislative history of RICO reveals reliance on Clayton Act model).

59. *Malley-Duff*, 483 U.S. at 156.

60. *Id.*

61. 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987).

62. *Id.* at 240 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

63. *Shearson/American*, 482 U.S. at 240.

64. *Id.* at 240-41.

Huntington v. Attrill.⁶⁵ *Huntington* determined that whether a law is penal depends upon whether recovery under the statute goes to the public or goes to a private individual.⁶⁶

Although this test appears quite simple on its face, its application has led to inconsistent, unpredictable and even erroneous conclusions. Part of this confusion can be attributed to *Murphy v. Household Financial Corp.*,⁶⁷ a case in which the Sixth Circuit attempted to reduce the *Huntington* test to three factors. In effect, however, the *Murphy* court rewrote the test, adding components entirely absent in the *Huntington* opinion.⁶⁸

The *Murphy* court reconstructed the *Huntington* test as follows. To determine whether a statute is penal, courts must conduct a three part inquiry: (1) whether the purpose of the statute is to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.⁶⁹

Each of the *Murphy* test's three factors is explained below to illustrate whether each factor contributes to resolution of the issue of the proper characterization of RICO treble damages. After examining each prong of the test, this comment explores the application of the *Murphy* test in the context of RICO treble damage actions and in the context of other federal statutes allowing recovery of treble damages.

a) *Wrongs to the Individual Versus Wrongs to the Public*

The first prong of the *Murphy* test asks whether the purpose of the statute is to redress individual wrongs or public wrongs. Under this prong, if the statute redresses public wrongs, it is penal. Alternatively, if the statute redresses individual wrongs, it is remedial. Because the RICO treble damage provision serves both of these purposes, this first prong acknowledges the dual nature of RICO treble damages. However, result-oriented courts have concluded that application of this factor establishes that an exclusive characterization of RICO treble damages is possible.

As noted earlier, Congress intended the treble damage award under RICO to serve as an incentive to private individuals to bring suit and, thus, to serve as "private attorneys general."⁷⁰ That Congress recognized the dual private/public nature of the RICO treble damage provision is

65. 146 U.S. 657 (1982).

66. *Id.* at 666-69 (emphasis in original).

67. 560 F.2d 206 (6th Cir. 1977).

68. One justification for the *Murphy* court's imposition of additional factors to determine whether a statute imposes a penalty or a remedy is that modern social welfare-type legislation was unknown at the time of the *Huntington* opinion. See *Porter v. Household Fin. Corp.*, 385 F. Supp. 336, 342 (S.D. Ohio 1974) ("[m]any developments have occurred in both case and statutory law since the time of the development of the common law governing the survival of actions for penalties").

69. *Murphy*, 560 F.2d at 209.

70. See *supra* text accompanying note 58.

nowhere more evident than in the statute's legislative history. According to Representative John Conyers, "[RICO's] essential purpose was to help underresourced public prosecutors by giving citizens a 'private attorney general function' — the right to sue crooks and cheats that defraud them for treble damages."⁷¹ First, the fact that individuals help combat crime, a law enforcement function which benefits the public, recognizes the penal nature of RICO treble damages.⁷² Second, the fact that the individual bringing the action personally recovers for injuries sustained speaks to the private, remedial nature of RICO treble damages.⁷³

Obvious support for the assertion that the private attorney general notion recognizes the dual function of RICO treble damages can be found from a review of the case law. In numerous contexts, courts employ the private attorney general rationale to support both the argument that treble damages are penal and the argument that treble damages are remedial.

*Bowles v. Farmers National Bank*⁷⁴ furnishes an example. In that case, the Administrator of the Office of Price Administration sued the estate of the defendant to recover treble damages for violations of the Emergency Price Control Act (EPCA). The defendant allegedly made six sales of whiskey in excess of the ceiling price. The Administrator claimed that the EPCA was remedial and therefore did not abate with the death of the liable party. The Sixth Circuit disagreed, however, and held that the treble damage provision of the EPCA, which encourages private individuals to enforce the provisions of the act on behalf of the public, is penal in nature.⁷⁵

In *Porter v. Household Finance Corp.*,⁷⁶ the District Court for the Southern District of Ohio reached the exact opposite result. In *Porter*, the

71. 133 CONG. REC. E4258-59 (daily ed. Oct. 29, 1987) (statement of Rep. John Conyers). Speaking to the purposes of the civil RICO action, one commentator stated:

The provision for a private civil remedy in the statute was designed to provide a supplementary way to enforce its basic purposes and to add substantial private resources to the enforcement of the criminal law. Thus, the commonly accepted rationale for the private civil RICO action is that it serves to convert the individual plaintiff, attracted by the incentive of treble damages, into a private attorney general who can enforce the RICO statute's prohibition against criminal conduct in a civil lawsuit.

Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 2-3 (1989).

72. See, e.g., 136 CONG. REC. E2086 (daily ed. June 21, 1990) (statement of Rep. Hughes) (main goal in allowing private civil RICO actions is to spark *public* interest by allowing citizens to act as private attorneys general); *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 519 (1985) (Marshall, J., dissenting) (Congress' concern under RICO is for competitors and investors in the marketplace, not for direct victims whose redress is found under existing state and federal laws); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 653 (1985) (treble damage actions brought by private individuals are primary aid in both enforcing the antitrust laws and deterring potential violators).

73. See, e.g., *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D. Ind. 1982) (RICO treble damages serve as a private enforcement mechanism, encouraging the victim to bring suit), *overruled on statute of limitations grounds sub nom. Ashland Oil, Inc. v. Arnett*, 656 F. Supp. 950, 953 (N.D. Ind. 1987).

74. 147 F.2d 425 (5th Cir. 1945).

75. *Id.* at 430.

76. 385 F. Supp. 336, 342-43 (S.D. Ohio 1974).

trustee of a bankruptcy estate sought treble damages under the Truth-in-Lending Act (TILA) from the defendant for failure to make disclosures required by the Act.

To decide whether the bankrupt individual's cause of action passed to the trustee, it was necessary for the court to first determine whether the Act was penal or remedial. The court held that TILA is remedial as indicated by the legislative intent to allow excess damages as a means of encouraging debtors to seek their remedy under the Act.⁷⁷

This same private attorney general argument has been advanced in the antitrust context in recognition of the dual function of the Clayton Act treble damage provision.⁷⁸ According to the Report of the Attorney General's National Committee to Study the Antitrust Laws,⁷⁹ the carrot of treble damages is no longer necessary to encourage suits by injured persons. Procedural and substantive law, largely favorable to the plaintiff, coupled with the award of attorneys' fees, provide sufficient incentive to individuals to bring private antitrust actions.⁸⁰ The fact that individuals have adequate incentive to sue even without treble damages implicitly recognizes the punitive nature of treble damages.

Likewise, the procedural and substantive law under RICO is largely favorable to plaintiffs. Minimal standards of proof are afforded the plaintiff bringing a civil RICO action.⁸¹ The plaintiff need prove his civil RICO case by a mere preponderance of the evidence.⁸² These minimal burdens clearly favor the plaintiff.⁸³ Furthermore, as with antitrust actions,

77. *Id.* at 342-43.

78. *Compare Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (treble damages provision of antitrust law serves private law enforcement function) with *Blue Shield v. McCreedy*, 457 U.S. 465, 472 (1982) (purpose of antitrust treble damages provision is to deter violators, deprive them of their illegal profits, and provide ample compensation to victims).

79. U.S. ATT'Y GEN.'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS, REPORT (1955).

80. *Id.* at 379. See also *Momand v. Universal Film Exchange*, 172 F.2d 37, 43 (1st Cir. 1948) (proof of loss under the antitrust laws has become so lenient as to require nothing more than speculation).

81. See *Organized Crime Control*, *supra* note 41, at 664 (statement of Rep. Poff) (more lenient burden of proof under the civil-remedy section than under criminal remedy section); Turley, *supra* note 38, at 243-44 (civil RICO plaintiffs have low threshold requirements for proving pattern of racketeering). Addressing this same point, Rep. Fred Boucher commented:

The pleading requirements [of civil RICO] are so minimal that virtually any contract dispute becomes a candidate for civil RICO jurisdiction. If the plaintiff alleges the existence of a contract dispute and can demonstrate that the mails or the telephone were used on several occasions either in forming or breaching the contract . . . the pleading requirements for a civil RICO case are met.

135 CONG. REC. E460 (daily ed. Feb. 22, 1989) (statement of Rep. Boucher).

82. *United States v. Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 279-80 n.12 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983).

83. As one court properly explained:

[T]o the extent a difficulty of proof exists, courts have recognized it and have dealt with it by imposing a somewhat lenient standard of proof for damages actually suffered. We doubt the courts would have made this accommodation if Congress intended the treble damage provision to rectify a difficulty of

attorneys' fees are recoverable under RICO's section 1964(c). Minimal proof requirements coupled with recovery of attorneys' fees should provide adequate incentive to the plaintiff. Considered together, these two points illustrate that treble damages are viewed, at least in part, as punitive and not solely remedial. Actual damages plus attorneys' fees would adequately compensate the plaintiff.

The private attorney general rationale for imposing treble damages, therefore, does not rule out the possibility that treble damages are both penal and remedial. Private enforcement actions as a means of deterring conduct that is "publicly" undesirable fail to conclusively establish that RICO treble damages are exclusively remedial or exclusively penal. Thus, this component of the *Murphy* test acknowledges the duality of treble damages.

Examination of the first factor of the *Murphy* test illustrates the folly of arguing that this factor conclusively establishes that RICO treble damages are solely remedial. Rather, this factor acknowledges that most treble damage provisions, including RICO's section 1964(c), serve dual purposes.

b) To Whom Recovery Is Directed

The second prong of the *Murphy* test asks whether recovery under the statute runs to the aggrieved individual or to the public. This component of the three part test clearly derives from the Supreme Court's decision in *Huntington*.

Recently, at least one court insisted that this second factor of the *Murphy* test is the sole determinant in deciding the proper characterization of a federal statute which authorizes recovery of treble damages.⁸⁴ Other courts have argued that sole reliance on this factor fails to acknowledge that at the time *Huntington* was decided, social welfare type legislation was unknown.⁸⁵ Other cases decided since *Huntington* have recognized that even if recovery runs to an individual, a statute still can have penal purposes.⁸⁶ This second factor poses the greatest difficulty for those courts

proof.

Sinclair Oil Corp. v. Atlantic Richfield Co., 720 F. Supp. 894, 904 (D. Utah 1989) (citations omitted). However, opposite views have been taken: "[S]ince civil RICO will almost always be based on allegations of fraud, plaintiff's complaint must satisfy the stringent pleading requirements of Federal Rule of Civil Procedure 9(b) which provides in pertinent part, 'in all averments of fraud . . . circumstances constituting fraud . . . shall be stated with particularity.'" Patton, *supra* note 30, at 401-02.

84. *Sinclair Oil Corp. v. Atlantic Richfield Co.*, 720 F. Supp. 894, 900 (D. Utah 1989) (the federal penalty characterization is dependent upon to whom the cause of action is given).

85. *Porter v. Household Fin. Corp.*, 385 F. Supp. 336, 342 (S.D. Ohio 1974) (the statute, in keeping with modern social welfare legislation, has a dual purpose of remedying harm to the individual and deterring business practices which are detrimental to society).

86. See, e.g., *Electronic Relays (India) PVT. Ltd. v. Pascente*, 610 F. Supp. 648, 652 (N.D. Ill. 1985) (a statute can have a remedial purpose yet contain specific provisions that are punitive in nature) But see *Brady v. Daly*, 175 U.S. 148, 156 (1899) (statutes giving the

attempting to exclusively characterize RICO treble damages as penal.⁸⁷ Unlike the other *Murphy* factors, this factor is inflexible. Courts cannot shape this factor to reach a desired result. The statute either authorizes recovery to the individual or does not.

The unyielding nature of this factor fails to acknowledge that treble damages serve a dual function. Thus, this factor is insufficient as a means of classifying treble damages as strictly remedial. These excessive damages undeniably serve a dual function by both punishing the wrongdoer and compensating the victim. The problem with this factor of the *Murphy* test is that it attempts to substitute labels for analysis. Discussing this problem in the antitrust context, commentators have suggested that because a treble damage provision offers both compensation and punishment, a proper analysis strikes a balance between these two goals.⁸⁸

c) Whether Recovery is Disproportionate to the Harm

The final prong of the *Murphy* test asks whether the recovery authorized by the statute is wholly disproportionate to the harm suffered. This inquiry is the sole factor which examines the effect of the treble damage award. Because this factor asks whether recovery is disproportionate, it implicitly recognizes the punitive potential of treble damages.

Some courts have held that statutes are remedial despite enhanced punitive-type damage provisions.⁸⁹ A closer look at these cases, however, reveals only that damages awarded in excess of actual damages do not *transform* a remedial statute into a statute for a penalty.⁹⁰ Nonetheless, these cases do not refute the notion that statutes awarding excess damages serve dual purposes.⁹¹ The third factor of the *Murphy* test does not purport to exclusively classify statutory excess damage awards as penal. Rather, it asks whether the damages are disproportionate to the harm suffered. It is an effect-oriented inquiry.

Other courts have invoked the argument advanced in the antitrust context that treble damages are not disproportionate to the harm suffered because

right of action to the individual are remedial and are not transformed into penal statutes merely because the individual is authorized to recover an amount in excess of actual damages).

87. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1141 n.47 (5th Cir. 1988) (the fact that recovery under § 1964(c) runs to the individual suggests the statute is not penal), *cert. denied*, 492 U.S. 918, *vacated on other grounds sub nom.* *Fryar v. Abell*, 492 U.S. 914 (1989).

88. *Hellerstein & Mullins*, *supra* note 30, at 126.

89. *See, e.g., Sullivan v. Associated Billposters & Distribs.*, 6 F.2d 1000, 1009 (2d Cir. 1925) (if recovery runs to the individual, a statute is remedial regardless of whether it limits recovery to actual loss or allows recovery in excess of actual loss).

90. *See Brady v. Daly*, 175 U.S. 148, 156 (1899).

91. In *Brady*, the Court stated: "Although punishment, in a certain and very limited sense, may be the result of the [antitrust] statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose . . ." *Brady*, 175 U.S. at 156. Regardless of whether punishment is the chief purpose, or a secondary purpose, *Brady* acknowledges the dual nature of the antitrust treble damage award.

treble damages serve as liquidated damages, ensuring that the individual is made whole.⁹² The liquidated damages rationale may suffice where Congress has explicitly denominated that excess damage provisions shall serve as liquidated damages.⁹³ However, where Congress has failed to explicitly denominate that excess damage provisions shall serve as liquidated damages, this argument is wholly without merit. The same uncertainty that attends the determination of whether Congress intended RICO treble damages to be penal or remedial also inheres in attempts to determine whether Congress intended RICO treble damages to serve as liquidated damages.

In addition, the antitrust argument that treble damages serve to remedy intangible, accumulative harm⁹⁴ is not as convincing in the RICO context. As one group of commentators points out, the long-term economic effects caused by antitrust violations are not present in the vast majority of cases involving RICO claims.⁹⁵ Although both antitrust and RICO violations may significantly harm the plaintiff's business, a RICO violation does not create the long-term market displacements which accompany antitrust violations.⁹⁶

The majority of RICO violations involve various allegations of fraud.⁹⁷ Statistical data reveal that RICO violations typically exist in the business and commercial setting, with only 9% of these violations involving criminal activity.⁹⁸ While the criminal activity would create long-term market displacements justifying imposition of treble damages as a means of liquidating uncertain, accumulative harm, the damages under the typical RICO claim, alleging fraud, are ascertainable.⁹⁹

Finally, the mere uncertainty of damages alone does not justify permitting excess damages. In other contexts where damages are uncertain, the plaintiff has been limited to actual damages. For example, in cases of libel and slander per se, substantial damages are awarded to the injured party, even in the absence of provable pecuniary harm.¹⁰⁰ Therefore, the argument

92. See, e.g., *Martin Oil Serv., Inc. v. Koch Ref. Co.*, 718 F. Supp. 1334, 1363 (N.D. Ill. 1989) (recovery of treble damages under the antitrust laws ensures that plaintiffs are made whole).

93. See *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 699 n.1, 707 (1945) ("[a]ny employer who violates . . . [the Fair Laborers Standard Act of 1938] shall be liable to the employee . . . in the amount of [his] unpaid minimum wages . . . and in an additional equal amount as liquidated damages") (emphasis added).

94. Goering, *supra* note 4, at 503-04.

95. Boyle, Naughton & Ween, *Coverage of RICO Claims Under a Directors' and Officers' Policy: Are Treble Damages Covered?*, 381 PRACTISING LAW INSTITUTE/COMMERCIAL LAW AND PRACTICE HANDBOOK SERIES DIRECTORS' AND OFFICERS' LIABILITY INSURANCE AND SELF INSURANCE 497, 520-21 (1986).

96. *Id.* at 520-21 & n.12.

97. *Id.* at 520 n.12.

98. *Id.*

99. *Id.* at 520-21.

100. See Note, *Government Corruption and Civil RICO: Providing Compensation for Intangible Losses*, 58 N.Y.U. L. REV. 1530, 1576 n.236.

that Congress intended RICO treble damages to be exclusively remedial because of the difficulty in ascertaining the extent of harm caused by a RICO violation lacks merit.

IV. Applying the Murphy Test

As noted above, under the *Murphy* test courts are required to balance three factors. One of the factors must tip the scale in favor of the desired result, thus underscoring the dual nature of treble damages. Naturally, courts which conclude that RICO treble damages are remedial rely on the first two *Murphy* factors. As discussed, these first two factors focus on the notion that (1) RICO treble damages redress wrongs to the individual and (2) recovery under RICO runs to the individual.¹⁰¹

However, courts which conclude that RICO treble damages are remedial have difficulty reconciling the third *Murphy* factor, which addresses the disproportionate relationship between the harm suffered and the damages awarded.¹⁰² This problem arises because frequently treble damages under RICO do provide a windfall to the plaintiff and therefore are disproportionate to the harm suffered. Observing that under the Clayton Act judges are reluctant to permit recovery where treble damages serve as a penalty and provide a windfall to the plaintiff, one commentator noted that the treble damage feature is an enforcement provision and superimposes a penalty upon compensation.¹⁰³ Thus, there must be a limit on literal construction where unreasonable results would be reached.¹⁰⁴

Conversely, courts which conclude that RICO treble damages are penal rely primarily on this third factor and emphasize the disproportionate effects of a RICO treble damage award.¹⁰⁵ These courts have the most trouble reconciling the first *Murphy* factor, namely, that recovery runs to the individual. To tip the scale in favor of characterizing the treble damage award as a penalty, however, these courts look to the second factor. They argue that while treble damages redress wrongs to the individual, they also redress public wrongs.¹⁰⁶

The divergent results reached by courts attempting to balance the *Murphy* factors highlight the inadequacy of exclusive characterizations in civil RICO. As the District Court for the Central District of California succinctly pointed out in *In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litigation*,¹⁰⁷ as with antitrust treble damages, there is no clear cut distinction in the cases as to whether RICO treble damages are penal or remedial.¹⁰⁸

101. See *supra* text accompanying notes 71-88.

102. See, e.g., *infra* text accompanying notes 130, 188-89.

103. Note, *Standing to Sue in Antitrust: The Application of Data Processing to Private Treble Damage Actions*, 11 TULSA L.J. 542, 552 (1976) (citations omitted).

104. *Id.*

105. See discussion of cases *infra* text accompanying notes 131-61.

106. See, e.g., *infra* text accompanying notes 154-61.

107. 636 F. Supp. 1138 (C.D. Cal. 1986).

108. *Id.* at 1155; see also *Ethicon, Inc. v. Aetna*, 737 F. Supp. 1320, 1335 (S.D.N.Y.

A. Decisions on Estate Liability Under RICO

Addressing the issue of whether an estate can be assessed treble damages for the deceased wrongdoer's RICO violations, one commentator concluded that a RICO action should survive the death of the alleged wrongdoer.¹⁰⁹ While recognizing that the treble damage provision of RICO has multiple purposes,¹¹⁰ this commentator insisted on focusing on the primarily remedial language of the statute. Accordingly, she stated that based on legislative history, Congress intended RICO not to provide a means for punishing the defendant, but rather to provide a remedy for the plaintiff.¹¹¹

Somewhat inconsistently, this same commentator emphasized that in resolving civil RICO issues, courts should keep the multiple purposes of treble damages in mind. Only when these multiple purposes are addressed can the broad, far-reaching intent of Congress be accomplished.¹¹² While recognizing that RICO treble damages serve multiple purposes, this scholar failed to acknowledge these multiple purposes. Instead, she cursorily concluded that RICO claims survive the defendant's death because RICO is a remedial measure meant to encourage private citizens to bring suit and to assure victims full compensation for their injury.¹¹³

Finally, this commentator insisted that recovery of treble damages in a civil RICO action is neither compensatory nor punitive in nature.¹¹⁴ Quite the contrary is true, however. A civil RICO treble damage action is in fact both compensatory and punitive.¹¹⁵

1990) (neither the Supreme Court nor any circuit court has directly stated whether antitrust treble damages are punitive).

109. Note, *Characterization & Computation*, *supra* note 8, at 535.

110. *Id.* at 533-34. Treble damages serve to (1) encourage private individuals to sue, (2) deter future violators, and (3) compensate victims for accumulative harm. The commentator stated: "[C]ourts should attempt to secure the three interests of RICO's treble damages without sacrificing any one element or frustrating the statutory scheme of RICO." *Id.* at 534 n.43.

111. *Id.* at 547.

112. *Id.* at 534.

113. *Id.* at 535. *But see* U.S. ATT'Y GEN.'S NAT'L COMM. TO STUDY ANTITRUST LAWS, REPORT 379 (1955) (mandatory trebled damages are no longer necessary to encourage suits by direct victims).

114. *Id.* at 535. Some commentators have refused to recognize the penal nature of treble damages by stating that treble damages are distinct from punitive damages. *See, e.g.,* Blakey & Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God — Is This the End of RICO?"*, 43 VAND. L. REV. 851, 919 (1990) (treble damages compensate for accumulative harm, and therefore, are not penal); Hellerstein & Mullins, *supra* note 30, at 132 (RICO treble damages are substantially different from common law punitive damages). While the author recognizes that punitive damages are distinct from treble damages (e.g., treble damages require no showing of wilful conduct and are not discretionary), the author contends that the deterring and punishing aspects of punitive damages are an integral part of a treble damage award.

115. *See supra* notes 16-17 and accompanying text.

This commentator addresses the issue of survivability by stating an approach and determining the opposite. Conceding that multiple purposes are served by a RICO treble damage award, the commentator nonetheless concludes that only the remedial aspect of the award will be honored.¹¹⁶ Furthermore, the commentator's reliance on the private attorney general notion as a mandate that RICO treble damage actions are remedial and survive is ill-founded.¹¹⁷ The purposes of this award are dual. Ignoring this duality is unjustified.

Although there is limited case law on the issue of whether an estate can be held liable for treble damages, the issue has been addressed in the context of RICO violations as well as other federal statutes which authorize excess damage awards. The cases discussed below illustrate the manner in which courts shape the *Murphy* test and choose among various interpretations of civil RICO's purpose in order to reach the result desired. In some instances, the result is correct because the dual purpose of RICO treble damages is achieved. However, the rationale employed by these courts is incorrectly focused. The cases illustrate how courts attempt to exclusively label the RICO treble damage provision as either remedial or penal. In addition, these cases illustrate how the courts fail to consider the effects of the damage award so as to insure that both purposes are achieved.

Two cases frequently cited on the issue of whether RICO treble damages are recoverable from an estate are *State Farm Fire and Casualty Co. v. Estate of Caton*¹¹⁸ and *Summers v. Federal Deposit Insurance Corp.*¹¹⁹ The results, if not the rationales, of these two cases have spurred RICO reform.¹²⁰

In *Caton*, the District Court for the Northern District of Indiana concluded that because a civil RICO action is remedial, it survives the death of the alleged wrongdoer, and therefore treble damages are recoverable from an estate.¹²¹ In *Caton*, one of the RICO defendants had been murdered. His estate argued that the action for treble damages under RICO did not survive the death of the alleged wrongdoer. The estate's argument depended upon a ruling that the treble damage provision is penal in nature and that, as a general rule, actions for penalties do not survive the wrongdoer's death.¹²²

116. Note, *Characterization & Computation*, *supra* note 8, at 535.

117. The attorney general rationale has continuously been used as a justification that treble damages benefit the public and therefore, serve, at least in part, as a penalty. See *supra* text accompanying notes 71-73.

118. 540 F. Supp. 673 (N.D. Ind. 1982), *overruled on statute of limitations grounds sub nom.* *Ashland Oil, Inc. v. Arnett*, 656 F. Supp. 950, 953 (N.D. Ind. 1987).

119. 592 F. Supp. 1240 (W.D. Okla. 1984). *Summers* did not involve the issue of whether an estate can be held liable for punitive damages but it has been cited so often as support for that conclusion that the author has chosen to analyze it here.

120. See generally *Blakey & Perry*, *supra* note 114, at 955.

121. *Caton*, 540 F. Supp. at 682.

122. See *supra* text accompanying notes 2-5.

In reaching its conclusion, the court first compared the treble damage provision of RICO with section 4 of the Clayton Act. The court noted that while the treble damage provision of the Clayton Act has been held to be penal, RICO's section 1964(c) was intentionally cast as a separate statute in order to avoid restrictive precedent of antitrust case law.¹²³

Having freed itself from antitrust precedent, the *Caton* court concluded that Congress denominated RICO treble damages as remedial.¹²⁴ The court primarily relied on language found in section 904(a) of title IX which provides: "The provisions of this title shall be liberally construed to effectuate its remedial purpose."¹²⁵ The *Caton* court determined that Congress explicitly denominated RICO remedial and, therefore, concluded that it was bound by statutory direction.¹²⁶

Although the *Caton* court primarily relied on the statutory language, the court also applied the *Murphy* test¹²⁷ to reach its conclusion. Addressing the first factor (whether the purpose of the action is to redress individual wrongs or public wrongs), the court concluded that the statute plainly provides redress for wrongs suffered by the individual.¹²⁸ Underscoring the significance of the second factor (whether recovery under the statute runs to the individual), the court held that recovery runs to the individual and is obviously meant to make him whole.¹²⁹ The court had difficulty, however, with the third factor (whether the treble damage award is disproportionate to the harm suffered). While recognizing that the treble damage provision might lead one to conclude that the award is wholly disproportionate to the harm, the court explained that treble damages serve to liquidate uncertain actual damages and to encourage private individuals to bring suit.¹³⁰

The court's decision amplifies the major flaw that this Comment identifies. *Caton* attempted to exclusively classify RICO treble damages as "remedial," thus failing to acknowledge the dual purposes to be served by RICO treble damages. Furthermore, *Caton* was unable to adequately explain the fact that the treble damage provision is disproportionate to the harm suffered.

123. *Caton*, 540 F. Supp. at 673, 680. The *Caton* court had to free itself from antitrust precedent due to an earlier decision of the Fifth Circuit which held that treble damages are in the nature of a penalty for the public wrong. See *Rogers v. Douglas Tobacco Bd. of Trade*, 244 F.2d 471 (5th Cir. 1957).

124. *Caton*, 540 F. Supp. at 681.

125. *Id.* (quoting 18 U.S.C. § 1961 (1982)).

126. *Id.*

127. *Caton* borrowed the three part test from *Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407 (7th Cir. 1980). This test is identical to the *Murphy* test and asks: (1) whether the purpose of the action is to redress individual wrongs or wrongs to the public; (2) whether recovery runs to the individual or to the public; and (3) whether the authorized recovery is wholly disproportionate to the harm suffered. *Id.* at 414.

128. *Caton*, 540 F. Supp. at 681.

129. *Id.*

130. *Id.*

Caton fails to comport with the notions of duality present in a RICO treble damage action. The court allowed recovery against an estate when punishment against the wrongdoer could no longer be effectuated.

In contrast to *Caton*, *Summers* held that RICO treble damages are penal.¹³¹ In *Summers*, as in *Caton*, the issue before the court was whether RICO treble damages are penal. However, the context in which this issue arose in *Summers* did not involve survivability. In *Summers*, the Federal Deposit Insurance Corporation (FDIC), as receiver of a defunct bank, moved to strike the plaintiff's claim for treble damages under RICO. The FDIC relied on a previous ruling of the *Summers* court which had determined that punitive damages could not be assessed against the FDIC as a receiver of a failed bank.¹³²

Agreeing that RICO treble damages are penal, the court refused to allow these damages to be recovered from the FDIC.¹³³ To reach this result, the court relied on case law holding that treble damages under section 4 of the Clayton Act are penal and therefore should not be assessed against the estate of a deceased wrongdoer.¹³⁴ Such actions, the court reasoned, survive only for actual, not treble, damages.¹³⁵

Applying the *Murphy* test, the court found that the purpose of the treble damage provision is essentially penal.¹³⁶ First, the court noted that Congress found racketeering to be primarily public, not private, because it drains resources from the economy and undermines the general welfare.¹³⁷ The public nature of racketeering suggests that RICO treble damages are punitive.¹³⁸ The court conceded that recovery under RICO runs to the individual, a factor suggesting that the statute is remedial.¹³⁹ However, the court did not find this second factor to be conclusive.¹⁴⁰ Applying the third factor, the court found that damages under RICO are wholly disproportionate to the injury.¹⁴¹ Relying on the two *Murphy* factors which indicated that RICO treble damages are penal, *Summers* concluded that RICO treble damages could not be assessed against the FDIC.¹⁴²

Unlike *Caton*, *Summers* properly noted that Congress has never explicitly denominated RICO's treble damages as "remedial."¹⁴³ Rather, all Congress did provide is that RICO as a whole "shall be liberally construed to

131. *Summers v. Federal Deposit Ins. Corp.*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984).

132. *Professional Asset Management, Inc. v. Penn Square Bank, N.A.*, 566 F. Supp. 134 (W.D. Okla. 1983).

133. *Summers*, 592 F. Supp. at 1243.

134. *Vandervelde v. Put & Call Brokers & Dealer's Ass'n*, 344 F. Supp. 118, 156-57 (S.D.N.Y. 1972).

135. *Summers*, 592 F. Supp. at 1242.

136. *Id.* at 1243.

137. *Id.* at 1242.

138. *Id.* at 1243.

139. *Id.* at 1242.

140. *Id.*

141. *Id.* at 1243.

142. *Id.*

143. *Id.*

effectuate its remedial purposes.”¹⁴⁴ *Summers* reasoned that this language does not necessarily imply that the treble damage provision is wholly remedial.¹⁴⁵

Most importantly, *Summers* properly recognized that “RICO cannot fairly be characterized *in toto* as either penal or remedial; instead, it must be analyzed *seriatim*.”¹⁴⁶ Thus, to date, *Summers* is one of the few courts to correctly recognize the hybrid nature of RICO treble damages.

In effect, *Summers*’ recognition that each RICO case should be analyzed “*seriatim*” suggests that the holding of the court is very limited. The court reached its conclusion by looking at the facts of the case before it, stating that “it would be plainly unjust to permit [a treble damages award] against the receiver, for innocent depositors and creditors would be punished, not the putative wrongdoer, the bank.”¹⁴⁷

Summers should be commended for its realistic treatment of the characterization problems accompanying a claim for RICO treble damages. Case law and commentary which rely on *Summers* as authority for the proposition that RICO treble damages are penal are in error. The *Summers* court itself explicitly limited its holding that an award of treble damages would have a penal effect to the case before it.¹⁴⁸

Although *Summers* reached the proper result, the court employed a faulty rationale in reaching its conclusion. *Summers* held that the treble damage award is penal *because* innocent parties are punished. However, it is precisely because the wrongdoer is *not punished* that the damage award fails to effectuate its penal purpose.¹⁴⁹ Therefore, the dual purposes of RICO treble damages are not satisfied.

An analysis similar to that followed in *Summers* can be found in *Massey v. City of Oklahoma City*.¹⁵⁰ In *Massey*, the District Court for the Western District of Oklahoma held that corrupt city officials can be sued in their individual capacity and held liable for treble damages under RICO, but that such a suit does not lie against a municipality.¹⁵¹ Citing *Summers*, the court recognized the punitive nature of treble damages.¹⁵² Public policy, the court concluded, dictates that innocent taxpayers should not be penalized for the wrongdoings of a corrupt city official.¹⁵³

144. *Id.*

145. *Id.*

146. *Id.* (court’s emphasis).

147. *Id.*

148. *Id.*

149. A contrary opinion is taken by one commentator who believes that the *Caton* court erroneously based its holding on the characterization of treble damages. “RICO’s treble damages are remedial. They should not survive against the receiver of a defunct bank because, as between two innocent parties — the plaintiff and the receiver — the receiver should not bear the burden of the loss.” Note, *Characterization & Computation*, *supra* note 8, at 535 n.47.

150. 643 F. Supp. 81 (W.D. Okla. 1986).

151. *Id.* at 86-87.

152. *Id.* at 86.

153. *Id.* at 87.

Massey illustrates the principle advocated here: where the dual purposes of a treble damage award cannot be effectuated, the claim for treble damages will fail. Because the true guilty party is not punished, these dual purposes fail to be accomplished. The remedial goal of compensation is served, but the penal goal of punishment is not.

Both *Summers* and *Massey* focus on the innocence of the party against whom recovery is sought. Consideration of this factor is inappropriate when deciding whether to award treble damages. Treble damages do not require a showing of willful or intentional conduct on the part of the alleged wrongdoer.¹⁵⁴ Therefore, the innocence of the defendant is irrelevant.

In Illinois, the federal courts have consistently held that because RICO treble damages are penal, an action seeking RICO treble damages cannot be brought against an estate. For example, in *First Interstate Bank of Nevada, N.A. v. National Republic Bank of Chicago*,¹⁵⁵ the District Court for the Northern District of Illinois had to determine whether the plaintiffs' RICO claims were extinguished by the defendant's death. The estate was being sued for the decedent's alleged involvement in a securities fraud conspiracy. The court concluded that RICO's treble damage provision is primarily penal and, therefore, does not survive the death of the defendant.¹⁵⁶

Like other courts which have applied the *Murphy* test,¹⁵⁷ the court conceded that the second factor (whether recovery runs to the individual or to the public) suggests that RICO's treble damage provision serves a remedial purpose.¹⁵⁸ Applying the first factor of the test, however, the court found that Congress intended treble damages not primarily as compensation, a purpose that would be served by actual damages, but rather as deterrence and punishment.¹⁵⁹

Recognizing that the *Caton* court had reached the opposite conclusion, the court insisted that the congressional purpose in allowing treble damages is to protect the public welfare by over-motivating victims to bring suit against the mob.¹⁶⁰ By encouraging victims to sue, treble damages accomplish the goal of assisting the notably limited number of government officers available to combat organized crime.¹⁶¹ Finally, applying the third *Murphy* factor (whether recovery is disproportionate to the harm suffered), the court concluded that RICO treble damages are unlimited and provide a windfall to the individual harmed.¹⁶²

154. See, e.g., *Sinclair Oil Corp. v. Atlantic Richfield Co.*, 720 F. Supp. 894, 904 (S.D. Utah 1989) (penalties are meant to punish individuals for committing socially undesirable acts and do not require that the actor have an evil state of mind).

155. No. 80-C-6401 (N.D. Ill. Mar. 10, 1985) (WESTLAW, Allfeds).

156. *Id.*, slip op. at 4-5.

157. The court relied on the test found in *Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407 (7th Cir. 1980). See *supra* note 127 and accompanying text.

158. *First Interstate Bank of Nevada*, No. 80-C-6401, slip op. at 5.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* For other Illinois court opinions holding that RICO treble damages are penal,

Recently, in *Costello v. Cooper*,¹⁶³ the United States District Court for the Southern District of New York refused to accept the defendant's argument that a cause of action under RICO abates upon the death of a plaintiff.¹⁶⁴ In *Costello*, the plaintiff sued the defendant in an action involving a real estate fraud scheme. Although recognizing that RICO treble damages are in part punitive, the court insisted that treble damages are largely remedial because they ensure that wrongs will be compensated for in light of the recognized difficulties in ascertaining actual damages.¹⁶⁵

It is critical to note that the issue in *Costello* was whether the action should abate due to the death of the *plaintiff*, not the defendant. Although the reasoning employed by the court is flawed, its conclusion is sound. Because the focus of penal damages is on the defendant, not the plaintiff, there is no reason why the action for treble damages should not survive the death of the plaintiff. In such cases, the punitive purpose of treble damages as well as the compensatory purpose of treble damages can be served.

In *Abell v. Potomac Insurance Co.*,¹⁶⁶ the Fifth Circuit had to determine whether RICO damages are compensatory or penal. Even though the case did not involve estate liability, the opinion is worth discussing because of its unique approach to the problem of characterizing RICO treble damages. In *Abell*, defendants, developers of property, were accused of RICO violations for securities fraud and mail and wire fraud relating to the issuance of bonds. The court had to determine whether an award of RICO treble damages would constitute duplicative relief under the Securities Exchange Act of 1934. If treble damages under RICO were remedial, the award would be duplicative.¹⁶⁷

The court decided that the portion of RICO damages in excess of actual damages is penal.¹⁶⁸ The court reasoned that had Congress merely wanted to make RICO plaintiffs whole, it would have limited recovery of civil RICO damages to the actual damages suffered.¹⁶⁹ The court concluded that Congress trebled RICO damages as an attack on public wrongs of

see *Carroll v. Brown*, No. 80-C-6251 (N.D. Ill. Nov. 25, 1988) (WESTLAW, Allfeds) (first and third factors of test indicate that RICO is penal in nature); *Eliassen v. Hamilton*, No. 81-C-123 (N.D. Ill. Mar. 9, 1987) (WESTLAW, Allfeds) (treble damages do not compensate the individual for harm suffered, but rather serve as a deterrent and are penal in nature); *City of Chicago v. North Austin Inv. Corp.*, No. 85-C-0441 (Dec. 24, 1985) (WESTLAW, Allfeds) (object of statute is clearly to inflict a punishment on the violator and therefore it is penal).

163. No. 86-Civ-3264 (JFK) (S.D.N.Y. Jan. 31, 1990) (WESTLAW, Allfeds).

164. *Id.*, slip op. at 2.

165. *Id.*

166. 858 F.2d 1104 (5th Cir. 1988), cert. denied, 492 U.S. 918, vacated on other grounds *sub nom.* *Fryar v. Abell*, 492 U.S. 914 (1989).

167. *Id.* at 1140-41.

168. *Id.* at 1141.

169. *Id.*

organized crime and therefore the "public" aim of the statute makes those damages in excess of actual damages penal.¹⁷⁰

The rationale in *Abell* falls between the *Summers* decision and the *Caton* decision. The *Abell* decision, however, is an ill-founded attempt at compromise. If Congress intended for civil RICO to merely compensate victims, it would have limited recovery to actual damages. To say that Congress enacted a treble damage statute to provide one-third compensation and two-thirds punishment takes intent one step too far. Furthermore, under RICO, the imposition of treble damages is mandatory. Thus, courts have no discretionary power to modify the damage award and allow recovery of only actual damages. One court, declining to assess RICO treble damages against an estate, remarked: "As a court and not a legislature, we cannot alter RICO to permit plaintiffs to bring their RICO claim for actual damages only."¹⁷¹

Although the Supreme Court has recognized the hybrid nature of RICO treble damages,¹⁷² the hybrid nature is not within the damage provision itself, but rather is found in the purpose and application of the damage provision as a whole. To split treble damages into thirds and characterize each third is to undermine the very purpose of treble damages.¹⁷³ Either the action can be brought or it cannot. The judiciary is not authorized to allow the action and then decide to make mandatory treble damages discretionary.¹⁷⁴ If Congress had intended this to be done, it would have enacted two damage provisions: one allowing for compensatory damages and one entitling the party to punitive damages. In fact, recent RICO reform bills take this very approach.¹⁷⁵

Though applying the same *three Murphy* factors, courts have reached contradictory pronouncements, thus revealing their inclination to apply these factors in a result-oriented manner. *Summers* disregarded the remedial characteristics of treble damages because the court believed that assessment of treble damages would merely serve to punish depositors and creditors instead of the failed bank itself.¹⁷⁶ In *Caton*, the court found it necessary to characterize treble damages as remedial, because otherwise

170. *Id.*

171. First Interstate Bank of Nevada No. 80-C-6401, slip op. at 5 (N.D. Ill. Mar. 10, 1985) (WESTLAW, Allfeds).

172. See discussion *supra* notes 45-64 and accompanying text.

173. In the context of determining the appropriate statute of limitations to be applied to a treble damage action, some courts hold that the remedial elements of the claim can be separated from the penal elements of the claim and the appropriate statute of limitations applied to each. See, e.g., *Carlson v. McCoy*, 566 P.2d 1073, 1075 (Colo. 1977). The issue of characterization of treble damages for statute of limitations purposes is now moot. A uniform four year statute of limitations applies in all civil RICO actions. See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987).

174. An award of RICO treble damages is mandatory. See *supra* text accompanying note 24.

175. See, e.g., H.R. 1046, 101st Cong., 1st Sess. (1989).

176. *Summers v. Federal Deposit Ins. Corp.*, 592 F. Supp. 1240, 1243 (W.D. Okla. 1984).

the racketeering victim could not recover from the wrongdoer's estate.¹⁷⁷ The court in *Massey*, recognizing the penal nature of treble damages, was persuaded that public policy prohibited penalizing innocent taxpayers for the wrongdoings of corrupt city officials.¹⁷⁸ These variant results illustrate the need for uniform decisions which award treble damages only where both the penal and remedial purposes are given effect.

B. Estate Liability Outside the RICO Context

In contexts other than RICO, the three part *Murphy* test has led to divergent results as well. For example, in *Wood v. First National Bank & Trust Co.*,¹⁷⁹ the Fifth Circuit determined that a section 130 claim under the Truth in Lending Act (TILA) is remedial and therefore survives the death of a debtor.¹⁸⁰ In *Wood*, the court had to first decide whether damages under TILA are remedial in order to resolve whether an action for TILA damages is transferrable to a trustee in bankruptcy.

Referring to *Porter v. Household Finance Corp.*,¹⁸¹ the court stated that the main goal of section 130, a type of social welfare legislation unknown at the time of *Huntington*, is remedial.¹⁸² The multiple damage award is meant to encourage debtors to bring claims and to liquidate uncertain actual damage.¹⁸³ The award is not meant to serve primarily as punishment imposed by the state for wrongdoing.¹⁸⁴

The reasoning employed in *Wood* resembles that used in *Caton*. However, one important distinction must be drawn. The TILA statute sets a minimum recovery of \$100 and a maximum of \$1000.¹⁸⁵ Therefore, under TILA, recovery cannot be said to be disproportionate to the harm suffered.

In *United States v. Edwards*,¹⁸⁶ the District Court for the Western District of Tennessee applied the *Murphy* test to determine whether the civil penalty provisions of the Clean Water Act were penal and, therefore, did not survive the death of the alleged wrongdoer. The United States

177. *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 682 (N.D. Ind. 1982).

178. *Massey v. City of Oklahoma City*, 643 F. Supp. 81, 86-87 (W.D. Okla. 1986).

179. 643 F.2d 188 (5th Cir. 1980).

180. *Wood*, 643 F.2d at 193.

181. 385 F. Supp. 336 (S.D. Ohio 1974).

182. *Wood*, 643 F.2d at 192.

183. *Id.*

184. *Id.*

185. Section 1640(a) provides in part:

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of —

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . . , except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000

Truth in Lending Act, § 130(a), 15 U.S.C. § 1640(a) (1988).

186. 667 F. Supp. 1204 (W.D. Tenn. 1987).

sued the defendant's estate for damages caused by his unlawful construction activity, which resulted in damages to wetlands. The court concluded that the civil penalty provisions of the Clean Water Act are penal and do not survive the death of the wrongdoer.¹⁸⁷

First, the court decided that the wrong the government sought to redress under the act is one to the public, not to any particular person.¹⁸⁸ Second, any civil penalty would be paid to the government, not to any individual.¹⁸⁹ The third factor of the *Murphy* test, whether recovery is disproportionate to the harm suffered, presented considerably more difficulty. The court ignored this third prong by deciding that the value of destroyed wetlands is not easily ascertainable.¹⁹⁰ Because any amount awarded would arguably be too little or too much, the third factor was not critical to the decision.¹⁹¹

These cases represent a small sampling of the problems created by courts' continued reliance on the *Murphy* test as a means of labeling the treble damage provision of RICO. In the RICO context, the inconsistent results can be eliminated once courts, instead of focusing on a label, focus on ascertaining the effects of the award and determining whether the dual purposes of the treble damage provision will be achieved.

V. Congressional Reform

During recent years, Congress' numerous attempts at RICO reform have failed.¹⁹² The proposals, as one commentator observed, "have been dazzling in their complexity and confusion."¹⁹³ But all share one common denominator: an attempt to limit the applicability of civil RICO. These reform bills seek to limit the applicability of civil RICO in part by limiting the availability of treble damage awards. Recovery of treble damages is allowed only to certain types of plaintiffs. In addition, many of these reform bills add a discretionary award of punitive damages.

House Bill 1046, the RICO Reform Act of 1989, exemplifies this approach.¹⁹⁴ Under this bill, attorneys' fees and treble damages are eliminated for all but a minority class of plaintiffs. Only states and municipalities injured in their business or property are entitled to the current treble

187. *Edwards*, 667 F. Supp. at 1213.

188. *Id.*

189. *Id.* The *Edwards* court pointed out that this factor distinguished a civil action brought under the Clean Water Act from antitrust, securities fraud and truth in lending actions where the penalty survives the wrongdoer's death and the recovery is paid to the injured party and not to the government. *Id.*

190. *Id.* at 1214.

191. *Id.* It should be noted that the very fact that damages are hard to ascertain has been a factor justifying treble damages in various other contexts. See, e.g., *supra* note 92 and accompanying text.

192. See, e.g., Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 652 n.3 (1990).

193. *Id.* at 656 & n.41.

194. H.R. 1046, 101st Cong., 1st Sess. (1989).

damage and attorneys' fee awards.¹⁹⁵ For most private citizens however, attorney's fees and treble damages are eliminated.¹⁹⁶

Instead, this class of plaintiffs is entitled to punitive damages up to twice the amount of actual damages if, by clear and convincing evidence, plaintiff proves that the defendant acted with malice.¹⁹⁷ This attempt by the Congress to limit availability of treble damages, and to add a separate provision for punitive damages only for egregious conduct on the part of the defendant, recognizes the abuse of the current treble damage provision and the windfall to plaintiffs in numerous situations. Furthermore, the attempted reform recognizes that only where the defendant can be punished should damages in excess of actual damages be allowed. Thus, through these reform measures, Congress is attempting to explicitly articulate what has already been stated in more general terms.

Most currently, Congressman William J. Hughes introduced H.R. 1717, the RICO Amendments Act of 1991.¹⁹⁸ In a recently published law review article, Hughes discussed the highlights of this bill.¹⁹⁹ With regard to the civil RICO provision for treble damages,²⁰⁰ Hughes analogized the proposed reform to a judicial gatekeeper.²⁰¹ The gatekeeper is given a broad range of discretion in deciding what conduct will be actionable under civil RICO.

First, where the alleged civil RICO conduct has been the subject of a criminal conviction, the action will be granted automatically.²⁰² Second, only cases involving egregious criminal conduct may be brought, conditioned on a showing that the civil suit serves a public interest.²⁰³ Finally,

195. *Id.* (proposed 18 U.S.C. § 1964(c)(1)(A)).

196. *Id.* (proposed 18 U.S.C. § 1964(c)(2)(A)).

197. *Id.* (proposed 18 U.S.C. § 1964(c)(3)).

198. H.R. 1717, 102d Cong., 1st Sess. (1991). According to a study prepared for West Publishing Company by the Center for Public Choice at George Mason University for Information for Public Affairs, Inc., the odds that the bill will pass the senate floor are 16% and the house floor, 24%. (WESTLAW, Billcast Library, July 1991).

199. Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639 (1990). The article actually discusses the 1990 version of this bill, H.R. 5111, 101st Cong., 2d Sess. (1990), which is identical to H.R. 1717.

200. H.R. 1717, 102d Cong., 1st Sess. (1991) (proposed 18 U.S.C. § 1964(c)). This section provides:

Section 1964(c) of title 18, United States Code, is amended by adding at the end the following: "This subsection is an extraordinary civil remedy for certain occurrences of criminal activities and is available only when its use clearly serves the public interest and provides appropriate deterrence against the repetition of egregious criminal conduct. For the purposes of this subsection, the term 'egregious criminal conduct' means a pattern of criminal conduct which was an integral part of ongoing redeterring activities and which was characterized by a combination of aggravating circumstances that renders the defendant's conduct more reprehensible than the minimum conduct necessary to sustain a violation of section 1962 of this title. . . ."

Id.

201. Hughes, *supra* note 199, at 647.

202. *Id.*

203. *Id.* at 646-47.

only cases which meet a preliminary finding of the following conditions will be allowed to advance: (1) the remedy is appropriate because there has been significant loss to the plaintiff; (2) the defendant's conduct was central to the harm; and (3) the remedy is needed to deter criminal conduct.²⁰⁴

Hughes' approach is based on the legislative history of RICO. Hughes interprets this legislative history to establish plainly that RICO's first and foremost purpose is to entice the public to bring private attorneys general suits and, consequently, to aid the government in prosecuting criminal conduct.²⁰⁵

Clearly, Hughes' statements lend strong support to the argument that RICO treble damages, in their current state, do in part act as a penalty and do redress harms to the public. Hughes' proposed bill further substantiates the dual purposes of a treble damage award. In fact, Hughes' legislative reform leans quite heavily in the direction of addressing public wrongs and, therefore, toward a characterization that RICO treble damages serve more as a penalty.

VI. Conclusion

Both the current RICO provisions and proposed RICO reforms support the position that because the imposition of treble damages on an estate would punish innocent heirs, and not the wrongdoer, the claim for treble damages should not be allowed. In such instances, only the remedial purpose of the treble damage award is served. Congress intended the treble damage award to accomplish the dual goals of compensation and punishment. Where both of these goals are not accomplished, the claim for treble damages must fail.

At present, the most equitable resolution of this issue is to allow the plaintiff to recover only actual damages from the RICO violator's estate. However, because Congress intended treble damages to serve both a penal and a remedial purpose, allowing only actual damages to be recovered runs contrary to this intent and to the mandatory imposition of treble damages. To counter this problem, Congress needs to reform the RICO treble damage provision in one of two ways. First, Congress should redefine the purpose to be served by the treble damage provision as being solely remedial. If Congress amends the statute in this manner, a treble damage action could be brought against the estate of an alleged RICO violator. Alternatively, Congress should revise the treble damage provision and provide for recovery of only compensatory damages where a RICO action is brought against the alleged RICO violator's estate.²⁰⁶

204. *Id.* at 648.

205. *Id.* at 648.

206. This comment has not attempted to propose reform for the RICO treble damage provision, but rather has concentrated on how the judiciary should interpret the current treble damage provision pending reform. For a detailed analysis of proposed RICO reform and suggested alternatives, see generally Blakey & Perry, *supra* note 114, at 851, 924-78,

Until RICO reform legislation is passed, courts are left to waffle with the proper characterization of treble damages. Obligated to follow the lead of the Supreme Court and hold that treble damages are “primarily remedial,” many courts continue to disregard the fact that treble damages are punitive. Many valid claims to preclude imposition of treble damages thus have been barred at the outset. A need exists for courts to respect the intent of Congress by recognizing that treble damages serve a dual purpose. Only in those cases where this dual purpose is effectuated can a claim for RICO treble damages prevail. Until such time as Congress decides to more explicitly denominate the aims of the civil RICO provision, courts are bound by this duality.

Melanie J. Jester

1049-101; Lynch, *A Conceptual, Practical Guide to RICO Reform*, 43 VAND. L. REV. 769, 802-03 (1990).